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No. 91-194

Supreme Court, U.S.  
FILED

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

**QUILL CORPORATION,**

*Petitioner,*

v.

**STATE OF NORTH DAKOTA,**  
by and through its Tax Commissioner,  
**HEIDI HEITKAMP,**

*Respondent.*

On Writ of Certiorari to the  
Supreme Court of the State of North Dakota

**JOINT APPENDIX**

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(Continued On Inside Cover)

PETITION FOR CERTIORARI FILED AUGUST 2, 1991  
CERTIORARI GRANTED OCTOBER 7, 1991

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The following have been omitted in printing this Joint Appendix. They appear in the Appendix to the Petition for Writ of Certiorari:

Memorandum Opinion of the North Dakota District Court, dated May 15, 1990 (printed in Petitioner's Appendix to the Petition for Writ of Certiorari, at p. A38).

Order For Judgment and Judgment of the North Dakota District Court, dated June 11, 1990 (printed in Petitioner's Appendix to the Petition for Writ of Certiorari, at pp. A43 and A45).

Opinion of the North Dakota Supreme Court, dated May 7, 1991 (printed in Petitioner's Appendix to the Petition for Writ of Certiorari, at p. A1).

Judgment on Remand of the North Dakota District Court, dated June 5, 1991 (printed in Petitioner's Appendix to the Petition for Writ of Certiorari, at p. A37).

No. 91-194

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1991

QUILL CORPORATION,

*Petitioner,*

v.

STATE OF NORTH DAKOTA,  
by and through its Tax Commissioner,  
HEIDI HEITKAMP,

*Respondent.*

On Writ of Certiorari to the  
Supreme Court of the State of North Dakota

JOINT APPENDIX

JA1

Quill Corporation v. North Dakota

**DOCKET ENTRIES**

District Court for Burleigh County,  
South Central Judicial District

<i>Date</i>	<i>Item</i>
July 24, 1989	Summons
July 24, 1989	Complaint
August 21, 1989	Answer and Affirmative Defenses and Counterclaim
September 8, 1989	Plaintiff's Answer to Defendant's Counterclaim
December 18, 1989	Defendant's Motion for Partial Summary Judgment
December 18, 1989	Memorandum in Support of Defen- dant's Motion for Summary Judg- ment
December 18, 1989	Affidavit in Support of Defendant's Motion for Summary Judgment
March 8, 1990	Plaintiff's Cross-Motion for Sum- mary Judgment
March 8, 1990	Brief in Response to Defendant's Motion For Partial Summary Judg- ment and in Support of Tax Com- missioner's Cross-Motion for Sum- mary Judgment
April 4, 1990	Defendant's Brief in Response to Plaintiff's Cross-Motion for Sum- mary Judgment and Reply Brief
April 30, 1990	Plaintiff's Reply Brief

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May 15, 1990	Memorandum Opinion
June 11, 1990	Judgment and Order for Judgment
June 13, 1990	Notice of Entry of Judgment
June 27, 1990	Notice of Appeal
July 3, 1990	Notice of Cross-Appeal
June 5, 1991	Judgment on Remand

#### DOCKET ENTRIES

North Dakota Supreme Court

<i>Date</i>	<i>Item</i>
August 6, 1990	Appellant's Brief and Appendix
September 24, 1990	Appellee's Brief
October 23, 1990	Reply Brief of Appellant
November 5, 1990	Reply Brief (Quill Corporation)
December 18, 1990	Oral Argument
May 7, 1991	Unanimous Opinion
May 30, 1991	Mandate
August 8, 1991	Notice of Filing Petition for Certiorari

JA3

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO. \_\_\_\_

State of North Dakota, by and	)	
through its Tax Commissioner,	)	
Heidi Heitkamp,	)	
	)	
	)	Plaintiff,
	)	COMPLAINT
vs.	)	
	)	
Quill Corporation,	)	
	)	
	)	Defendant.

Plaintiff, State of North Dakota, through its Tax Commissioner, Heidi Heitkamp, for its demand for relief, alleges:

I.

Quill Corporation ("Quill") is a privately owned corporation.

II.

Quill's headquarters and warehouse are located in Lincolnshire, Illinois.

III.

Quill is in the business of direct mail order sales throughout the United States.



JA4

IV.

Quill is not registered to do business in North Dakota with the Secretary of State.

V.

Quill regularly and systematically solicits the consumer market in North Dakota through, among other things, distribution of catalogues into the State, use of a toll-free line for consumer orders and returns, and collection of its credit card debts and sales to North Dakota consumers.

VI.

Pursuant to N.D.C.C. § 57-40.2-01 and N.D.A.C. § 81-04.1-01-03.1, Quill is a "retailer" and a "retailer maintaining a place of business in this state."

VII.

Quill is required to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax on its sales into North Dakota pursuant to N.D.C.C. § 57-40.2-07.

VIII.

The State of North Dakota, through its Tax Commissioner, contacted Quill on May 5, 1989, and informed it of its obligation to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax (Exhibit A). Quill responded by alleging that it does not have an obligation to collect and remit North Dakota sales and use tax because it has no physical presence in North Dakota (Exhibit B).

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IX.

A justiciable controversy exists because Quill failed to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax in violation of to [sic] N.D.C.C. §§ 57-40.2-01 and 57-40.2-07.

X.

The State of North Dakota, acting through its Tax Commissioner, brings this action pursuant to N.D.C.C. §§ 57-01-02, 57-40.2-13, and Chapter 32-23.

WHEREFORE, the State of North Dakota, through its Tax Commissioner, respectfully requests that the court declare that Quill is a "retailer" and a "retailer maintaining a place of business in this state." The State also requests executory relief to require Quill to obtain a North Dakota sales and use tax permit and collect and remit all tax, penalty and interest due from July 1, 1987.

Dated this 7th day of July 1989.

State of North Dakota  
Nicholas J. Spaeth  
Attorney General

/s/ Carla J. Smith  
Carla J. Smith  
Assistant Attorney General  
Office of State Tax Commissioner  
State Capitol-Eighth Floor  
600 East Boulevard Avenue  
Bismarck, North Dakota 58505

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EXHIBIT A

May 5, 1989

Mr. Jack Miller, President  
Quill Corporation  
P.O. Box 5900  
Lincoln Shore, Illinois 60179-5900  
Mr. Arnold Miller, Treasurer  
Quill Corporation  
P.O. Box 5900  
Lincoln Shore, Illinois 60179-5900

Gentlemen:

The North Dakota sales and use tax law defines "retailer" and "retailer maintaining a place of business" as "every person who engages in regular or systematic solicitation of a consumer market in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable optic, microwave, or other communication system." (Attachment 1)

Any company qualifying as a North Dakota retailer under this definition must hold a North Dakota sales and use tax permit and collect and remit use tax on taxable goods sold in North Dakota.

North Dakota Century Code §57-40.2-07 provides "any retailer maintaining a place of business in this state . . . shall obtain a permit from the commissioner. . . ." The North Dakota Administrative Code §81-04.1-01-03.1 states that "[a]ny person having nexus in North Dakota and making taxable sales in or making taxable sales having a destination in North Dakota must obtain a North Dakota sales and use tax permit from the tax commissioner and collect and remit tax on these sales." (Attachment 2)

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Based on a review of your North Dakota sales activity, your company is required to hold a North Dakota sales and use tax permit and collect and remit use tax on sales made into North Dakota. Enclosed is a North Dakota sales and use tax permit application. This form must be completed and returned to the Tax Commissioner's office by June 9, 1989. North Dakota sales and use tax collections should begin immediately.

Please contact me at (701) 224-3470 with any questions you may have. I will be happy to assist you in any way.

Sincerely,

Walter M. Stack  
Director  
Sales and Special Taxes

WMS:mdm  
Attachments  
cc: Heidi Heitkamp  
Tax Commissioner

MAILED CERTIFIED MAIL—  
RETURN RECEIPT REQUESTED

(Attachments omitted in printing)



JA8

EXHIBIT B

(Letterhead Of)

QUILL CORPORATION  
100 South Schelster Rd.  
Lincolnshire, IL 60069  
(312) 634-4850

May 12, 1989

Mr. Walter M. Stack, Director  
Sales and Special Taxes  
State of North Dakota  
Office of State Tax Commissioner  
Bismarck, North Dakota 58505

Dear Mr. Stack:

In response to your letter of May 5, 1989, this is to inform you that Quill Corporation is engaged in the mail order sales of office supplies and equipment conducted exclusively from the States of Illinois and California. Quill Corporation owns no property and has no employees located outside of Illinois and California.

Neither Quill Corporation nor any representative of Quill Corporation conducts any business activities, maintains a place of business, or owns or leases property in North Dakota. Consequently, Quill Corporation is not subject to North Dakota income or sales taxes and is not required to collect (nor does it collect) North Dakota sales taxes.

If you have any further questions, please contact me.

Very truly yours,

QUILL CORPORATION

/s/ Arnold Miller  
Arnold Miller  
Treasurer

AM/sk

JA9

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO. 41677

STATE OF NORTH DAKOTA, by )	
and through its Tax Commissioner, )	
HEIDI HEITKAMP, )	
Plaintiff, )	ANSWER
vs. )	AFFIRMATIVE
QUILL CORPORATION, )	DEFENSES
Defendant. )	AND
	COUNTERCLAIM

Defendant, Quill Corporation ("Quill"), by its attorneys, McDermott, Will & Emery and Pearce and Durick, in answer to Plaintiff's Complaint admits, denies and alleges as follows:

I.

Quill Corporation ("Quill") is a privately owned corporation.

ANSWER TO PARAGRAPH I:

Admits the allegations of paragraph I of Plaintiff's Complaint.

II.

Quill's headquarters and warehouse are located in Lincolnshire, Illinois.

JA10

ANSWER TO PARAGRAPH II:

Admits the allegations of paragraph II of Plaintiff's Complaint. Quill alleges that it also maintains a warehouse in Ontario, California.

III.

Quill is in the business of direct mail order sales throughout the United States.

ANSWER TO PARAGRAPH III:

Denies the allegation of paragraph III of Plaintiff's Complaint on grounds that the phrase "direct mail order sales" is vague. Quill admits that it solicits orders of merchandise through the use of catalogs and advertising flyers which are mailed from locations outside North Dakota to customers located throughout the United States; it receives and accepts all orders for merchandise either in Illinois or California; and it ships merchandise from locations outside North Dakota to customers located throughout the United States either by mail or common carrier.

IV.

Quill is not registered to do business in North Dakota with the Secretary of State.

ANSWER TO PARAGRAPH IV:

Admits the allegations of paragraph IV of Plaintiff's Complaint. Quill alleges that it is not transacting business in North Dakota pursuant to N.D.C.C. § 10-22-01 and is not required to procure a certificate of authority from or register with the Secretary of State of North Dakota.

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V.

Quill regularly and systematically solicits the consumer market in North Dakota through, among other things, distribution of catalogues into the State, use of a toll-free line for consumer orders and returns, and collection of its credit card debts and sales to North Dakota consumers.

ANSWER TO PARAGRAPH V:

Denies the allegations of paragraph V of Plaintiff's Complaint, except that Quill admits that catalogs and advertising flyers are mailed via the United States post office from locations outside of North Dakota to persons located throughout the United States, including North Dakota.

VI.

Pursuant to N.D.C.C. § 57-40.2-01 and N.D.A.C. § 81-04.1-01-03.1, Quill is a "retailer" and a "retailer maintaining a place of business in this state."

ANSWER TO PARAGRAPH VI:

Denies the allegations of paragraph VI of Plaintiff's Complaint.

VII.

Quill is required to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax on its sales into North Dakota pursuant to N.D.C.C. § 57-40.2-07.

ANSWER TO PARAGRAPH VII:

Denies the allegations of paragraph VII of Plaintiff's Complaint.

## VIII.

The State of North Dakota, through its Tax Commissioner, contacted Quill on May 5, 1989, and informed it of its obligation to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax (Exhibit A). Quill responded by alleging that it does not have an obligation to collect and remit North Dakota sales and use tax because it has no physical presence in North Dakota (Exhibit B).

## ANSWER TO PARAGRAPH VIII:

Admits the authenticity of the letters attached as Exhibits A and B. Quill neither admits nor denies the other allegations of paragraph VIII of Plaintiff's Complaint on the grounds that the writings speak for themselves.

## IX.

A justiciable controversy exists because Quill failed to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota use tax in violation of to [sic] N.D.C.C. §§ 57-40.201 [sic] and 57-40.2-07.

## ANSWER TO PARAGRAPH IX:

Denies the allegations of paragraph IX of Plaintiff's Complaint, except that Quill admits that a justiciable controversy exists regarding the constitutionality of N.D.C.C. §§ 57-40.2-01 and 57-40.2-07 as applied to Quill.

## X.

The State of North Dakota, acting through its Tax Commissioner, brings this action pursuant to N.D.C.C. §§ 57-01-02, 57-40.2-13, and Chapter 32-23.

## ANSWER TO PARAGRAPH X:

Denies the allegations of paragraph X of Plaintiff's Complaint, except that Quill admits that this action is brought pursuant to N.D.C.C. Chapter 32-23.

## AFFIRMATIVE DEFENSES

## FIRST AFFIRMATIVE DEFENSE

Quill, by its attorneys, for its First Affirmative Defense alleges as follows:

1. Quill Corporation is organized under the laws of Delaware, is authorized to transact business only in the States of Illinois and California, and maintains its principal place of business in Lincolnshire, Illinois. Quill warehouses merchandise only in the States of Illinois and California. Quill does not own or control any corporation or other entity and is not owned or controlled by another corporation or entity.
2. Quill mails catalogs and advertising flyers to customers located throughout the United States, including customers located in North Dakota. All catalogs and advertising flyers are mailed from locations outside North Dakota.
3. Orders for merchandise are mailed or telephoned by customers to Quill's offices in Illinois or California.
4. All orders are received and accepted by Quill in Illinois or California.
5. All goods ordered from Quill are shipped to customers from locations outside North Dakota either by mail or common carrier.



6. Quill does not own any tangible property, real or personal, in North Dakota.

7. Quill does not maintain in North Dakota any office, distribution house, sales house, warehouse or any other place of business.

8. Quill does not have in North Dakota any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells.

9. Quill does not have a telephone listing in North Dakota, does not have a toll-free telephone line, and does not advertise its merchandise for sale in local newspapers, on billboards, or by radio or television in North Dakota.

10. All of the contacts which Quill has with the State of North Dakota are via the United States mail, common carrier or interstate telephone.

11. As applied to Quill, the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), and the related obligations to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota taxes, are liabilities which impose an unconstitutional burden upon interstate commerce in violation of the Commerce Clause (article 1, section 8, clause 3 of the United States Constitution), *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution.

WHEREFORE, for the following reasons, Quill prays as follows:

A. That this Court declare that the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to

N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), as applied to Quill by the State of North Dakota acting through its Tax Commissioner, violate the Commerce Clause (article 1, section 8, clause 3) of the United States Constitution, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution;

B. That this Court declare that Quill is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales and use taxes;

C. That this Court award Quill its costs and such other relief as this Court deems appropriate.

## SECOND AFFIRMATIVE DEFENSE

Quill, by its attorneys, for its Second Affirmative Defense alleges as follows:

1-10. Restates and realleges paragraphs 1 to 10 inclusive of its First Affirmative Defense as paragraphs 1 to 10 inclusive of its Second Affirmative Defense.

11. As applied to Quill, the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), and the related obligations to obtain a North Dakota sales and use tax permit and to collect and remit North Dakota taxes, are liabilities which impose an unconstitutional burden on Quill in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution.

WHEREFORE, for the foregoing reasons, Quill prays as follows:

A. That this Court declare that the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), as applied to Quill by the State of North Dakota acting through its Tax Commissioner, violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution;

B. That this Court declare that Quill is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales or use taxes;

C. That this Court award Quill its costs and such other relief as this Court deems appropriate.

#### COUNTERCLAIM

Quill, by its attorneys, as its counterclaim against the State of North Dakota and its Tax Commissioner Heidi Heitkamp, alleges as follows:

1-10. Restates and realleges paragraphs 1 to 10 inclusive of its First Affirmative Defense as paragraphs 1 to 10 inclusive of its Counterclaim.

11. Application of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1) to Quill violates the Commerce Clause (article I, section 8, clause 3 of the United States Constitution), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Na-

*tional Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

12. Plaintiff's determination that Quill must obtain a North Dakota sales and use tax permit, collect and remit North Dakota taxes, and incur the related obligations imposed under N.D.C.C. Chapter 57-40.2 is an action under color of the laws of the State of North Dakota and the authority of the Office of the State Tax Commissioner which constitutes an intentional deprivation of Quill's rights secured by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (article 1, section 8, clause 3) of the United States Constitution in violation of 42 U.S.C. § 1983.

WHEREFORE, Quill prays as follows:

A. That this Court declare N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1) unconstitutional as applied to Quill.

B. That this Court find that the State of North Dakota, by and through its Tax Commissioner, Heidi Heitkamp, acting under color of North Dakota law, intentionally denied Quill of its rights secured by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of the United States Constitution in violation of 42 U.S.C. § 1983.

C. That this Court enter a judgment against the State of North Dakota, the Office of the State Tax Commissioner under 42 U.S.C. § 1988 for the attorneys' fees and other costs incurred by Quill in defending itself from Plaintiff's attempt to deprive Quill of its constitutional rights and privileges without due process of law.



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QUILL CORPORATION

By: /s/ John E. Gaggini  
John E. Gaggini

John E. Gaggini  
Don S. Harnack  
McDermott, Will & Emery  
111 West Monroe Street  
Chicago, Illinois 60603  
(312) 372-2000

By: /s/ William P. Pearce  
William P. Pearce

William P. Pearce  
Pearce and Durick  
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Bismarck, North Dakota 58502  
(701) 223-2890

JA19

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO. 41677

State of North Dakota, by and	)	
through its Tax Commissioner,	)	
Heidi Heitkamp,	)	
	)	PLAINTIFF'S
Plaintiff,	)	ANSWER TO
	)	DEFENDANT'S
vs.	)	COUNTERCLAIM
	)	
Quill Corporation,	)	
	)	
Defendant.	)	

The North Dakota Office of Tax Commissioner, through its attorney Carla J. Smith, Answers the Defendant's Counterclaim as follows:

COUNTERCLAIM NO. 1:

Quill Corporation is organized under the laws of Delaware, is authorized to transact business only in the States of Illinois and California, and maintains its principal place of business in Lincolnshire, Illinois. Quill does not own or control any corporation or other entity and is not owned or controlled by another corporation or entity.

ANSWER TO COUNTERCLAIM NO. 1:

Plaintiff admits that the Defendant's principal place of business is in Lincolnshire, Illinois. The Plaintiff does not

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possess sufficient information to admit or deny the remaining allegations in paragraph 1 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 2:

Quill mails catalogs and advertising flyers to customers located throughout the United States, including customers located in North Dakota. All catalogs and advertising flyers are mailed from locations outside North Dakota.

ANSWER TO COUNTERCLAIM NO. 2:

Plaintiff admits that Quill mails catalogs and advertisement flyers to customers located throughout the United States, including customers in North Dakota. The Plaintiff does not possess sufficient information to admit or deny the remaining allegations in paragraph 2 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 3:

Orders for merchandise are mailed or telephoned by customers to Quill's offices in Illinois or California.

ANSWER TO COUNTERCLAIM NO. 3:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 3 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 4:

All orders are received and accepted by Quill in Illinois or California.

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ANSWER TO COUNTERCLAIM NO. 4:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 4 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 5:

All goods ordered from Quill are shipped to customers from locations outside North Dakota either by mail or common carrier.

ANSWER TO COUNTERCLAIM NO. 5:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 5 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 6:

Quill does not own any tangible property, real or personal, in North Dakota.

ANSWER TO COUNTERCLAIM NO. 6:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 6 of the Counterclaim and therefore denies them.

COUNTERCLAIM NO. 7:

Quill does not maintain in North Dakota any office, distribution house, sales house, warehouse or any other place of business.

ANSWER TO COUNTERCLAIM NO. 7:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 7 of the Counterclaim and therefore denies them.

## COUNTERCLAIM NO. 8:

Quill does not have in North Dakota any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells.

## ANSWER TO COUNTERCLAIM NO. 8:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 8 of the Counterclaim and therefore denies them.

## COUNTERCLAIM NO. 9:

Quill does not have a telephone listing in North Dakota, does not have a toll-free telephone line, and does not advertise its merchandise for sale in local newspapers, on billboards, or by radio or television in North Dakota.

## ANSWER TO COUNTERCLAIM NO. 9:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 9 of the Counterclaim and therefore denies them.

## COUNTERCLAIM NO. 10:

All of the contacts which Quill has with the State of North Dakota are via the United States mail, common carrier or interstate telephone.

## ANSWER TO COUNTERCLAIM NO. 10:

The Plaintiff does not possess sufficient information to admit or deny the allegations in paragraph 10 of the Counterclaim and therefore denies them.

## COUNTERCLAIM NO. 11:

Application of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1) to Quill violates the Commerce Clause (article I, section 8, clause 3 of the United States Constitution), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967).

## ANSWER TO COUNTERCLAIM NO. 11:

The Plaintiff denies the allegations in paragraph 11 of the Counterclaim.

## COUNTERCLAIM NO. 12:

Plaintiff's determination that Quill must obtain a North Dakota sales and use tax permit, collect and remit North Dakota taxes, and incur the related obligations imposed under N.D.C.C. Chapter 57-40.2 is an action under color of the laws of the State of North Dakota and the authority of the Office of the State Tax Commissioner which constitutes an intentional deprivation of Quill's rights secured by the Due Process Clause of the Fourteenth Amendment and the Commerce Clause (article I, section 8, clause 3) of the United States Constitution in violation of 42 U.S.C. § 1983.

## ANSWER TO COUNTERCLAIM NO. 12:

The Plaintiff denies the allegations in paragraph 12 of the Counterclaim.



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### AFFIRMATIVE DEFENSES

The Plaintiff, through its attorney, for its Affirmative Defenses alleges:

#### I.

The Defendant's claim against the Plaintiff in her official capacity as Tax Commissioner for the State of North Dakota is barred by the Eleventh Amendment of the United States Constitution and the Doctrine of Sovereign Immunity.

#### II.

The Defendant's claim as it may relate to Heidi Heitkamp individually is barred as she is entitled to qualified immunity under 42 U.S.C. §1983.

#### III.

The Defendant's claim fails to state a claim upon which relief may be granted.

WHEREFORE, the Plaintiff respectfully requests that the Defendant's Counterclaim be dismissed.

Dated this 7th day of September 1989.

State of North Dakota  
Nicholas J. Spaeth  
Attorney General

/s/ Carla J. Smith  
Carla J. Smith  
Assistant Attorney General  
Office of State Tax Commissioner  
State Capitol  
600 East Boulevard Avenue  
Bismarck, North Dakota 58505-0599  
(701) 224-2781

JA25

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO. 41677

STATE OF NORTH DAKOTA, by )  
and through its Tax Commissioner, )  
HEIDI HEITKAMP, )

Plaintiff, )

vs. )

QUILL CORPORATION, )

Defendant. )

### DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, Quill Corporation ("Quill"), by its attorneys, McDermott, Will & Emery and Pearce & Durick, pursuant to Rule 56 of the North Dakota Code of Civil Procedure, hereby moves for entry of summary judgment in its favor on issues of law raised by the Complaint, Answer and Affirmative Defenses to the Complaint<sup>1</sup> (hereinafter referred to as "Complaint").

In support of this Motion, Quill states that there is no genuine issue as to any material fact regarding the Complaint and submits herewith the sworn Affidavit of Ar-

<sup>1</sup> At this time Quill does not move for summary judgment on issues raised by its Counterclaim.

nold Miller (Treasurer of Quill),<sup>2</sup> Quill's Responses to Plaintiff's First Set of Interrogatories,<sup>3</sup> and a Memorandum of Law in support of this Motion.

Quill respectfully submits that it is entitled as a matter of law to a judgment declaring that it is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales or use taxes.

WHEREFORE, Quill requests:

A. That this Court issue an order establishing a schedule for briefing, hearing and ruling on the Motion for Summary Judgment, allowing Plaintiff thirty (30) days to respond to Quill's Motion, allowing Quill fourteen (14) days to reply and setting oral argument within seven (7) days of Quill's reply;

B. That this Court declare that the provisions of N.D.C.C. Chapter 57-40.2 (including but not limited to N.D.C.C. §§ 57-40.2-01, 57-40.2-07 and N.D.A.C. § 81-04.1-01-03.1), as applied to Quill by the State of North Dakota acting through its Tax Commissioner, violate the Commerce Clause (article 1, section 8, clause 3), the Due Process Clause of the Fourteenth Amendment of the United States Constitution, *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and article I, section 23 of the North Dakota Constitution;

C. That this Court declare that Quill is not required to obtain a North Dakota sales and use tax permit and is not required to collect or remit North Dakota sales and use taxes; and

<sup>2</sup> Attached as Exhibit A and hereinafter referred to as Affidavit.

<sup>3</sup> Attached as Exhibit B.

D. That this Court award Quill such other relief as this Court deems appropriate.

Respectfully submitted,  
QUILL CORPORATION

By: /s/ William P. Pearce  
One of its Attorneys

Dated: December 15, 1989

John E. Gaggini  
Don S. Harnack  
McDermott, Will & Emery  
111 West Monroe Street  
Chicago, Illinois 60603  
(312) 372-2000

William P. Pearce  
Pearce & Durick  
314 East Thayer Avenue  
Bismarck, North Dakota 58502  
(701) 233-2890

(Exhibit A follows. Exhibit B omitted in printing.)



STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO. 41677

STATE OF NORTH DAKOTA, by )  
and through its Tax Commissioner, )  
HEIDI HEITKAMP, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
QUILL CORPORATION, )  
 )  
Defendant. )

AFFIDAVIT IN SUPPORT  
OF DEFENDANT  
QUILL CORPORATION'S  
MOTION FOR SUMMARY JUDGMENT

Arnold Miller, being duly sworn according to law, deposes and says that he is Treasurer of Quill Corporation; that Affiant has personal knowledge of the contents of and is authorized to make this affidavit; and that Affiant, if sworn as a witness, could competently testify to the facts herein set forth. Affiant in support of Defendant's Motion for Summary Judgment, states as follows:

1. Defendant Quill Corporation (hereinafter "Quill") is a corporation organized under the laws of the State of Delaware. Quill maintains its principal place of business in Lincolnshire, Illinois and maintains offices and warehouse facilities only in the States of Illinois and California.

2. Quill is registered as a foreign corporation and is qualified to do business only in the States of Illinois and California.

3. Quill has not procured a certificate of authority or registered to do business in North Dakota. Quill has appointed no registered agent to act on its behalf in North Dakota and has not authorized any person to apply for, receive or accept any licenses or permits in North Dakota.

During the period July 1, 1987 through June 30, 1989:

4. Quill solicited sales of office products through catalogs and advertising flyers mailed from points outside North Dakota to persons located throughout the United States.

5. Orders for merchandise were received via mail, telephone, telecopy or telex from customers located in approximately every zip code within the United States including North Dakota. Quill received and accepted or rejected all orders for merchandise only at its offices in Illinois and California. All correspondence with customers in connection with their orders was conducted from Illinois or California.

6. All merchandise was shipped to customers only by mail or common carrier. All merchandise was shipped to North Dakota customers from locations outside North Dakota. All merchandise returned by customers to Quill was shipped by mail or common carrier.

7. The shipping methods used by Quill were limited to Parcel Post, UPS, and other common carrier freight lines. Quill did not deliver merchandise to customers (or pick up merchandise from customers) in North Dakota in Quill owned or leased vehicles.

8. Invoices for merchandise shipped to customers were mailed to customers usually within one day of the shipment. An invoice was mailed for each shipment of merchandise to a customer.

9. An open account was established by Quill for customers who ordered merchandise.

10. Customer payments for Quill merchandise were made by personal, business, certified, or cashiers check. Quill did not accept payment by credit card, did not provide to customers its own credit card or charge account, and did not extend any other credit to its customers.

11. All payments for merchandise were received by Quill at its Lincolnshire, Illinois, or its Ontario, California offices. Quill never received any payment for merchandise purchased by North Dakota customers in North Dakota nor did any person or entity on behalf of Quill receive payment in North Dakota from any Quill customer.

12. Quill did not employ any credit or collection agents which operated in North Dakota to collect delinquent accounts or dishonored checks, or to repossess merchandise from customers. Any collection inquiries initiated by Quill personnel were conducted by mail or telephone from Quill's Illinois and California offices.

13. Quill did not engage any credit bureau located in North Dakota to determine the creditworthiness of any of its customers. All credit inquiries were conducted by Quill employees by mail or telephone from Quill's Illinois and California offices.

14. Quill did not file any lawsuits or institute any other action in any North Dakota court.

15. Quill did not maintain an account with any North Dakota bank or financial institution.

16. Quill did not maintain, hold, or use, temporarily or permanently, directly or through an agent, any office, distribution point, sales house or sample room, warehouse, storage place, other physical location or place of business in North Dakota.

17. Quill did not have any employee, representative, agent, salesman, independent contractor, canvasser, solicitor or other person of any kind act or operate in North Dakota for the purpose of selling, soliciting, or taking orders for merchandise, delivering merchandise, accepting payments or deposits, servicing, repairing or installing merchandise, or performing any other services on behalf of Quill in North Dakota.

18. Quill did not own or retain title or any security interest in any tangible property, real or personal, located in North Dakota.

19. Quill did not own or lease any motor vehicles located or used in North Dakota, nor did it hold title, license or other registration for any vehicle used in North Dakota.

20. Quill did not purchase any merchandise from North Dakota manufacturers for resale to Quill customers.

21. Quill owned no interest in any company that operated in North Dakota. No company owned any interest in Quill.

22. Quill sold office products which were described and offered for sale in its catalogs and advertising flyers. The printing and mailing of Quill's catalogs and advertising flyers were conducted from locations outside North Dakota.

23. Quill did not conduct any design, preparation publication, printing, distribution or mailing of catalogs and advertising flyers in North Dakota nor did any agent,

employee, or representative of Quill perform any design, preparation, publication, printing, distribution, or mailing activities on behalf of Quill in North Dakota.

24. Quill advertised in nationally circulated magazines.

25. Quill did not advertise in newspapers, it did not advertise in magazines which were distributed on a local basis in North Dakota, and it did not advertise in any publication published in North Dakota.

26. Quill did not solicit or advertise by radio, cable or network television, or newspaper in North Dakota. Quill did not solicit sales by means of telegraphy, computer data base, optic, microwave, or similar communication systems owned by Quill and located in North Dakota.

27. Quill did not list any "800", toll-free or WATTS line number in its catalogs or advertisements for customers to use in ordering merchandise.

28. Quill has no answering service in North Dakota and never maintained any telephone listing in North Dakota.

29. Quill never held any meetings or conducted any seminars or training courses in North Dakota.

30. Quill never licensed any intangible rights, or authorized any licensee, franchisee, dealer or distributor to operate under the Quill name or otherwise offer Quill merchandise in North Dakota.

31. Quill never maintained a post office box in North Dakota.

32. Quill never displayed, advertised by display or promoted by demonstration or seminar its merchandise in North Dakota.

33. Quill never advertised on billboards located in North Dakota.

34. Quill never arranged or participated in any cooperative advertising with anyone in North Dakota.

35. Quill never performed any services in North Dakota.

FURTHER, Affiant sayeth not.

/s/ Arnold Miller  
Arnold Miller, Affiant

SUBSCRIBED AND SWORN TO  
before me this 8th day  
of December, 1989.

/s/ Marilyn R. Sherman  
Notary Public



STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO. 41677

State of North Dakota, by and	)	
through its Tax Commissioner,	)	
Heidi Heitkamp,	)	
	)	PLAINTIFF'S
Plaintiff,	)	CROSS-MOTION
	)	FOR
vs.	)	SUMMARY
	)	JUDGMENT
Quill Corporation,	)	
	)	
Defendant.	)	

Plaintiff, State of North Dakota, through its Attorney General Nicholas J. Spaeth and its attorneys Carla J. Smith and Robert W. Wirtz, moves for summary judgment pursuant to Rule 56 of the North Dakota Code of Civil Procedure in its favor upon the pleadings, affidavits and exhibits submitted in this matter.

In support of its motion, Plaintiff states the following:

1. Plaintiff relies upon two principle bases to support its position. The first basis rests upon traditional notions of nexus that are factually conceded by the Quill Corporation ("Quill") and thus present no genuine issues of fact to be resolved. Quill has chosen methods of direct marketing its products in North Dakota that result in Quill having contacts with North Dakota in excess of those arguably protected by *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967). These contacts

result in Quill having approximately \$1,000,000 of its property annually located in North Dakota. Therefore, the State of North Dakota may constitutionally require Quill to collect use tax under N.D.C.C. §57-40.2-01(7).

2. The second basis is founded on the principle that Quill conducts regular and systematic solicitation of North Dakota's consumer market to a sufficient degree that creates an "economic presence" in the state. This economic presence is the constitutional equivalent of physical presence necessary to require Quill to collect North Dakota's use tax from its customers.

3. In further support of its Motion for Partial Summary Judgment, Plaintiff submits the Exhibits to the Tax Commissioner's Brief in Response to Quill's Motion for Partial Summary Judgment and in Support of the Tax Commissioner's Cross-Motion for Summary Judgment and the Deposition Exhibits.

WHEREFORE, Plaintiff State of North Dakota respectfully requests that the Court:

- a. Find that during the period from July 1, 1987 to the present, Quill utilized the method of selling its products in North Dakota on the basis of sales "on approval" under N.D.C.C. §41-02-43(1)(a); and, therefore, Quill retained title and risk of loss relating to its property under N.D.C.C. §41-02-44(1) on approximately \$1,000,000 of property annually for ninety days following receipt of the merchandise by the North Dakota customer or until it was returned to Quill. Therefore, Quill had personal property located in North Dakota.
- b. Find that, while Quill's property was located in North Dakota, Quill and its property received

benefits and protections afforded by North Dakota government services.

- c. Find that Quill regularly and systematically solicited sales of tangible personal property in the State of North Dakota by telephone and through the use of catalogs, periodicals and advertising flyers pursuant to N.D.C.C. §57-40.2-01.
- d. Find that Quill's contacts with the State of North Dakota are such that Quill has purposefully availed itself of North Dakota's consumer market and has created an economic presence within the state that is the equivalent of Quill being a local merchant.
- e. That Quill is a "retailer" and a "retailer maintaining a place of business" in North Dakota and is required pursuant to N.D.C.C. ch. 57-40.2 to obtain a North Dakota sales and use tax permit and to collect and remit use tax on its retail sales of goods delivered into North Dakota since July 1, 1987.
- f. Declare that N.D.C.C. ch. 57-40.2, as applied to Quill, does not violate either the Due Process Clause of the Fourteenth Amendment or the Commerce Clause of the United States Constitution, or Article I, §23 of the North Dakota Constitution.
- g. Enter an order for such other relief as the Court deems appropriate.

Dated this 5th day of March, 1990, at Bismarck, North Dakota.

/s/ Carla J. Smith  
 Carla J. Smith  
 Assistant Attorney General  
 Office of State Tax Commissioner  
 State Capitol-Eighth Floor  
 600 East Boulevard Avenue  
 Bismarck, North Dakota 58505-0599  
 Telephone No. (701) 224-2781

/s/ Robert W. Wirtz  
 Robert W. Wirtz  
 Assistant Attorney General  
 Office of State Tax Commissioner  
 State Capitol-Eighth Floor  
 600 East Boulevard Avenue  
 Bismarck, North Dakota 58505-0599  
 Telephone No. (701) 224-2776

Alan Friedman  
 Special Assistant Attorney General  
 386 University Avenue  
 Los Altos, California 94022  
 (415) 941-0556

(Exhibits omitted in printing.)



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STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO. 41677

State of North Dakota, by and	)	AFFIDAVIT
through its Tax Commissioner,	)	OF TAX
Heidi Heitkamp,	)	COMMISSIONER
	)	HEIDI HEITKAMP
Plaintiff,	)	IN SUPPORT
	)	OF THE TAX
vs.	)	COMMISSIONER'S
	)	CROSS-MOTION
Quill Corporation,	)	FOR SUMMARY
	)	JUDGMENT
Defendant.	)	

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH—ss

Heidi Heitkamp, having been duly sworn, states that:

1. I am the Tax Commissioner for the State of North Dakota.
2. I requested Research Analyst Kathy Strombeck to compile a document indicating the taxable sales for 1988 of all office product and equipment businesses holding a North Dakota sales and use tax permit.
3. The document I received in response to my request is attached to this Affidavit as Exhibit A.
4. Based upon a comparison of Exhibit A and Quill's taxable sales for 1988 as indicated in their Answer to the Tax Commissioner's First Set of Interrogatories, Quill

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would rank sixth of thirty-three such retailers in North Dakota if it were collecting and remitting use tax on its sales into North Dakota.

5. Quill does not remit use tax on its sales into North Dakota.

6. The names and permit numbers in Exhibit A have been deleted due to the secrecy provisions in N.D.C.C. §§ 57-39.2-23 and 57-40.2-13.

/s/ Heidi Heitkamp  
Heidi Heitkamp  
TAX COMMISSIONER

Subscribed and sworn to before me this 5th day of March, 1990.

/s/ June Veit  
Notary Public

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## EXHIBIT A

NAME	PERMIT	CY-1988 TAXABLE SALES
Company A	000000	\$1,600,023
Company B	000000	1,423,556
Company C	000000	1,394,814
Company D	000000	1,154,023
Company E	000000	1,114,916
Company F	000000	963,895
Company G	000000	917,829
Company H	000000	870,277
Company I	000000	782,346
Company J	000000	771,086
Company K	000000	688,289
Company L	000000	661,741
Company M	000000	640,641
Company N	000000	623,552
Company O	000000	586,790
Company P	000000	522,301
Company Q	000000	497,535
Company R	000000	495,814
Company S	000000	484,414
Company T	000000	475,681
Company U	000000	462,333
Company V	000000	437,166
Company W	000000	419,878
Company X	000000	412,916
Company Y	000000	398,849
Company Z	000000	396,609
Company AA	000000	359,212
Company BB	000000	309,735
Company CC	000000	189,581
Company DD	000000	126,996
Company EE	000000	100,182
Company FF	000000	77,706
Company GG	000000	43,471
		<u>\$20,404,157</u>

JA41

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO. 41677

State of North Dakota, by and	)	
through its Tax Commissioner,	)	AFFIDAVIT OF
Heidi Heitkamp,	)	KATHY
	)	STROMBECK
Plaintiff,	)	IN SUPPORT
	)	OF THE TAX
vs.	)	COMMISSIONER'S
	)	CROSS-MOTION
Quill Corporation,	)	FOR SUMMARY
	)	JUDGMENT
Defendant.	)	

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH—ss

Kathy Strombeck, having been duly sworn, states that:

1. I am the Research Analyst for the North Dakota Office of Tax Commissioner. I have been in this position for six years.

2. Tax Commissioner Heidi Heitkamp requested that I prepare a document indicating the annual taxable sales for 1988 for all office product and equipment businesses holding a North Dakota sales and use tax permit.

3. The data was extracted from the North Dakota sales tax base using SIC codes that relate to office product and supply businesses.

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4. Exhibit A attached to this Affidavit is the data compiled as a result of the Tax Commissioner's request.

/s/ Kathy Strombeck  
Kathy Strombeck

Subscribed and sworn to before me this 5th day of  
March, 1990.

/s/ June Veit  
Notary Public

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EXHIBIT A

NAME	PERMIT	CY-1988 TAXABLE SALES
Company A	000000	\$1,600,023
Company B	000000	1,423,556
Company C	000000	1,394,814
Company D	000000	1,154,023
Company E	000000	1,114,916
Company F	000000	963,895
Company G	000000	917,829
Company H	000000	870,277
Company I	000000	782,346
Company J	000000	771,086
Company K	000000	688,289
Company L	000000	661,741
Company M	000000	640,641
Company N	000000	623,552
Company O	000000	586,790
Company P	000000	522,301
Company Q	000000	497,535
Company R	000000	495,814
Company S	000000	484,414
Company T	000000	475,681
Company U	000000	462,333
Company V	000000	437,166
Company W	000000	419,878
Company X	000000	412,916
Company Y	000000	398,849
Company Z	000000	396,609
Company AA	000000	359,212
Company BB	000000	309,735
Company CC	000000	189,581
Company DD	000000	126,996
Company EE	000000	100,182
Company FF	000000	77,706
Company GG	000000	43,471
		<hr/> \$20,404,157

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO. 41677

STATE OF NORTH DAKOTA, by )  
and through its Tax Commissioner, )  
HEIDI HEITKAMP, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
QUILL CORPORATION, )  
 )  
Defendant. )

AFFIDAVIT OF ARNOLD MILLER  
IN SUPPORT OF  
DEFENDANT QUILL CORPORATION'S  
RESPONSE TO PLAINTIFF'S  
CROSS-MOTION FOR SUMMARY JUDGMENT

ARNOLD MILLER, being duly sworn according to law,  
deposes and states as follows:

This Affidavit is made on my personal knowledge. If  
sworn as a witness at the trial of the above-captioned  
case, I could competently testify to the following facts:

1. I am Treasurer of Quill Corporation (hereinafter  
"Quill").

2. Quill is a corporation organized under the laws of  
the State of Delaware and maintains its principal place  
of business in Lincolnshire, Illinois. Quill sells various of-  
fice products and certain food products to customers lo-

cated throughout the United States, primarily to business  
firms and a large number of charitable organizations, gov-  
ernmental entities, health related institutions and organiza-  
tions.

*Q-Tech Computers:*

3. Everex Corporation, a company unrelated to Quill,  
manufactures personal computers under the trade name  
Q-Tech.

4. Quill buys Q-Tech personal computers from Everex  
Corporation and resells them to customers located through-  
out the United States, including customers located in  
North Dakota. All computers sold by Quill are shipped  
to customers by common carrier.

5. If dissatisfied, any customer who purchases a com-  
puter can return the computer to Quill for refund, credit,  
or replacement.

6. Any computer returned to Quill by any customer is  
shipped by common carrier.

7. Quill employs individuals described as "Products  
Specialists" who are located in Lincolnshire, Illinois and  
who are available to communicate by telephone with cus-  
tomers who call Quill with questions regarding merchan-  
dise purchased, including Q-Tech computers.

8. Quill's catalogs and advertising brochures advertise  
that any customer may purchase a service contract to  
cover the repair of Q-Tech computers.

9. Everex Corporation sells On Site Warranty Service  
Agreements (hereinafter referred to as "service agree-  
ments") to customers located throughout the United  
States.



10. Quill buys service agreements from Everex and resells them.

11. National Computer Systems (hereinafter referred to as "NCS") is a computer service company, unrelated to Quill, which performs computer repair services on personal computers, including Q-Tech computers.

12. Quill does not hold any right or interest in or have authority to exercise control over NCS or Everex. Neither Everex nor NCS hold any right or interest in or have authority to exercise any control over Quill.

13. Customers who choose to purchase an NCS service agreement for computer repair services contract directly with NCS.

14. The customer is responsible for contacting NCS directly for the performance of computer repair services under contract with NCS.

15. All services performed by NCS for customers who purchase Q-Tech computers is rendered solely on behalf of the customer and the customer is solely responsible to pay NCS for services performed by NCS.

16. Any profits arising from computer services performed by NCS accrues solely to the benefit of NCS.

17. Quill does not receive any payments from Everex, NCS or customers attributable to computer services performed by NCS.

18. All computer repair services performed by NCS are performed by the agents, representatives or employees of NCS.

19. NCS is not authorized to act as an agent or representative of Quill nor is any NCS employee or representative authorized to act as an agent or representative of Quill.

20. Quill does not have any agents, employees or other representatives performing any repair or other services on Q-Tech computers or on any other merchandise sold to customers located in North Dakota or any other state.

*Quill-Service-Link:*

21. Quill sells a computer software program called Quill-Service-Link (hereinafter referred to as "QSL") to customers located throughout the United States.

22. Quill requires that users of QSL follow certain rules when using the OFFICE EXPERT Bulletin Board System (hereinafter also referred to as "Bulletin Board") function of QSL. OFFICE EXPERT is an electronic bulletin board that allows one user to communicate by means of telephone communication via computer modem with other users of QSL. One of the restrictions of QSL prohibits users from publishing any profane, abusive or offensive language on the Bulletin Board.

23. Quill retains the right to cancel the access account number of any QSL user who violates the rules for use of the Bulletin Board.

24. Quill has never cancelled the Bulletin Board access privileges of any QSL user or requested the return of any QSL computer software program sold to any customer.

25. Quill does not own or hold any interest in or title to any computer modems in North Dakota.

*Telephone Price Survey:*

26. Quill does not conduct any telephone price survey or otherwise place telephone calls to any North Dakota vendor in order to competitively price Quill merchandise.



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27. Quill obtains information regarding merchandise prices charged by various office supply vendors located throughout the United States by reviewing the catalogs and advertisements of these office supply vendors. Such review is performed by Quill employees located at Quill's headquarters in Lincolnshire, Illinois.

28. No Quill employee, representative or agent has ever entered North Dakota to obtain information for Quill or to conduct any business on behalf of Quill.

FURTHER, AFFIANT SAYETH NOT.

/s/ Arnold Miller  
Arnold Miller, Affiant

STATE OF ILLINOIS  
COUNTY OF COOK—ss:

I, the undersigned, a Notary Public in and for said County, in the State of aforesaid, DO HEREBY CERTIFY that Arnold Miller, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal, this 30th day of March, 1990.

/s/ Orchid Farales  
Notary Public

My commission expires: 5-10-92

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STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO. 41677

STATE OF NORTH DAKOTA, by )  
and through its Tax Commissioner, )  
HEIDI HEITKAMP, )

Plaintiff, )

vs. )

QUILL CORPORATION, )

Defendant. )

AFFIDAVIT OF THOMAS J. CURRY  
IN SUPPORT OF  
DEFENDANT QUILL CORPORATION'S  
RESPONSE TO PLAINTIFF'S  
CROSS-MOTION FOR SUMMARY JUDGMENT

THOMAS J. CURRY, being duly sworn according to law, deposes and states as follows:

This Affidavit is made on my personal knowledge. If sworn as a witness at the trial of the above-captioned case, I could competently testify to the following facts:

1. I currently reside at 382 North Gate Road, Lindenhurst, Illinois 60046.

2. I was employed as Assistant Circulation Manager and ultimately promoted to Vice President of Circulation/Marketing with National Bellas Hess, Inc. from 1954 through 1969 and I have personal knowledge of the operation of that company during that period.

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3. National Bellas Hess, Inc. was a Delaware Company and maintained its principal place of business in North Kansas City, Missouri.

4. National Bellas Hess, Inc. solicited sales of merchandise by mailing catalogs and advertising flyers to customers located throughout the United States.

5. Customers ordered merchandise from National Bellas Hess by mail and by telephone.

6. National Bellas Hess, Inc. advertised a "Complete Satisfaction" guarantee in its catalogs which stated that:

"We [National Bellas Hess, Inc.] guarantee that everything you [customer] see in our catalog is exactly as pictured and described. We guarantee our merchandise to be first quality at the lowest possible prices. We guarantee if, for any reason, you find any item not completely satisfactory, you may return it and we will exchange it or immediately REFUND YOUR MONEY!" [Bracketed material added]

7. The National Bellas Hess, Inc. "Complete Satisfaction" guarantee was advertised in the company's 1966 Spring Sale catalog. A true and correct photocopy of the cover page and advertised guarantee from the referenced catalog are attached hereto as Exhibit 1. A true and correct photocopy of a National Bellas Hess Spring 1970 catalog is attached hereto as Exhibit 2.

8. The "Complete Satisfaction" guarantee advertised by National Bellas Hess, Inc. in its 1966 and 1970 Spring Sale catalogs was the same guarantee advertised by National Bellas Hess from 1954 through 1969.

FURTHER, AFFIANT SAYETH NOT.

/s/ Thomas J. Curry  
Thomas J. Curry, Affiant

Dated: March 30, 1990

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STATE OF WISCONSIN  
COUNTY OF KENOSHA—ss:

I, the undersigned, a Notary Public in and for said County, in the State of aforesaid, DO HEREBY CERTIFY that Thomas J. Curry, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed the said instrument as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal, this 30th day of March, 1990.

/s/ Carol A. Schoenbeck  
Notary Public

My commission expires: 4-15-90

(Exhibits omitted in printing)

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SUPREME COURT OF THE UNITED STATES

No. 91-194

Quill Corporation,

Petitioner

v.

North Dakota by and through its Tax  
Commissioner, Heidi Heitkamp

ORDER ALLOWING CERTIORARI.

Filed October 7, 1991.

The petition herein for a writ of certiorari to the Supreme Court of North Dakota is granted limited to Question 1 presented by the petition. The case is set for oral argument in tandem with No. 91-119, *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*

October 7, 1991